Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	)	WC Docket No. 06-172
	)	
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	)	WC Docket No. 07-97

COMMENTS OF QWEST CORPORATION

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SUMMARY

By stating its deregulatory intent in the preamble to the Telecommunications Act of 1996, Congress left little doubt that the Act's pro-competitive and deregulatory goals were to be complementary, and not mutually exclusive, goals. The deregulatory authority granted to the Commission in Section 10 of the Act serves as a manifestation of Congress' deregulatory mandate. The shot clock and "deemed granted" components of Section 10 indicated the priority Congress attached to deregulation. Thus, any standard the Commission attaches to review of petitions for forbearance pursuant to Section 10 should reflect the principle that competition ideally should be achieved via deregulation.

In the successive proceedings in which it initially applied the statutory test of Section 10, the Commission remained true to the principle that deregulation is the best avenue to lasting competition. Particularly in the context of petitions pertaining to forbearance from UNE obligations, the Commission applied a fact-based approach that looked at both actual and potential competition, and considered the coverage of competing facilities, be they intramodal or intermodal. The D.C. Circuit, in reviewing the approach in the context of appeals of grants of forbearance, appeared to have little difficulty in determining that the Commission's approach was true to the goals of the Act.

The Commission, however, in its Verizon 6 MSA and Qwest 4 MSA Orders inexplicably deviated from its earlier approach. The Commission focused almost exclusively on actual competition and disregarded both potential competition and competitive coverage. Not only was this departure, in the words of the D.C. Circuit's order, "unexplained," but it had troubling implications in the context of the dynamic telecommunications market. In the face of increasingly robust competition from both cable and wireless providers, and rapidly declining access line counts for the incumbent telecom providers, the decision to continue to apply stringent regulation to the ILEC seemed at odds with the goals of the 1996 Act. If anything, the increasingly competitive local telecommunications market counseled for an approach less stringent than the approach it took in addressing competition in Omaha and Anchorage.

The D.C. Circuit's remand provides the Commission an opportunity to revisit its approach. While the court's remand focuses on the "unexplained" departure from precedent, it does require a justification for the Commission's emphasis on actual competition if the Commission decides to adhere to such an approach. The Commission should revisit the factors that drove its initial decision to decline a market share approach, *i.e.*, that such an approach is not appropriate for the local telecommunications market, that regulatory rate distortions will lead to erroneous market definitions, and that there are other factors which constrain ILEC local service pricing.

If the Commission once again pursues the path it took in the remanded orders, not only will the deregulatory goal of the Act be compromised, but the pro-competitive goal will be imperiled as well. The Commission should trust its initial instincts and determination and return to the approach it took in Omaha and Anchorage. The Commission should, however, make the standard less stringent than its Omaha one to reflect the continually-developing competition in the local telecommunications market. The Commission should maintain Section 10 forbearance

as an avenue to deregulation because it provides a relatively quick and targeted approach to promote the pro-competitive, deregulatory goals of the Act.

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COMMENTS OF QWEST CORPORATION

In these Comments, Qwest Corporation ("Qwest") responds to the August 20, 2009 Public Notice seeking comment on remands by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") of the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*.[1]

[1] Public Notice, "Wireline Competition Bureau Seeks Comment on Remands of *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order*," DA 09-1835 (rel. Aug. 20, 2009) and Order, DA 09-2083 (rel. Sept. 18, 2009); *In the Matter of Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas,* WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21294 ¶ 1 (2007) ("*Verizon 6 MSA Forbearance Order*"), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) ("*Verizon v. FCC*"); *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11730 ¶ 1 (2008) ("*Qwest 4 MSA Forbearance Order*"), *remanded*, *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) ("*Qwest Corporation v. FCC*").

I. INTRODUCTION

The Commission should recognize that the best solution is often the simplest solution and return to an approach no more stringent than it took in its *Omaha Forbearance Order*,[2] and which it subsequently applied in the *ACS Forbearance Order*.[3] The D.C. Circuit has tasked the Commission with providing an explanation for its "unexplained departure from precedent" in its rulings on the Verizon 6 MSA and Qwest 4 MSA Petitions for Forbearance. Rather than attempt to craft an explanation for its approach on those two Petitions, or create an entirely new standard, the Commission should adopt an approach that it knows meets the goals of the 1996 Act and has survived judicial scrutiny. Of particular import and relevance to this proceeding is the fact that the D.C. Circuit not only was cognizant of the Commission's assessment of competition sufficient to justify forbearance, but the Court also specifically analyzed the Commission's application of its standard to the factual record.[4]

The D.C. Circuit did not evaluate the particular components of the Commission's approach in the *Verizon 6 MSA Order* and the *Qwest 4 MSA Order* because it did not have to address the issues. The approach was such a departure from existing Commission precedent that

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[2] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Qwest Omaha Forbearance Order*"), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[3] *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959-60, ¶¶ 1-2 (2007) ("*ACS UNE Forbearance Order*"), *appeals dismissed*, *Covad Commc'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing).

[4] *Qwest Corp. v. FCC*, 482 F.3d at 479 (citations omitted) ("The Commission 'tailor[ed] Qwest's relief' to Cox's 'extensive' voice-enabled cable network, selecting nine wire centers in which 'sufficient facilities-based competition' existed 'to ensure that the interests of consumers and the goals of the Act [were] protected under the standards of section 10(a).'")

this issue proved to be dispositive. As will be explained below, however, the departure from precedent was just the first of many problems with the Commission's approach. If the Commission attempts to support its approach in the *Verizon 6 MSA Order* and the *Qwest 4 MSA Order* with an explanation for the departure from precedent or if it attempts to craft a new standard incorporating the basic elements of that approach, the Commission will be left to justify a standard that does not achieve its intended purpose, and actually moves further away from the ultimate goals of the 1996 Act.

In these Comments, we will first address the importance of the forbearance deregulatory tool in the Commission's arsenal and explain how such a tool represents a crucial component in meeting the goals of the Act. We will then look at the approach the Commission took in its *Omaha/ACS Forbearance Orders*, and describe how it deviated from that approach in the orders that are subject to remand in this proceeding. Finally, we will address the problems inherent in the Commission's use of a market power analysis and how these problems provide further support for the Commission to return to a standard no more onerous than its approach on UNE forbearance.

II. THE FCC SHOULD MAINTAIN FORBEARANCE AS A VITAL DEREGULATORY TOOL

In the Telecommunications Act of 1996, deregulation is explicitly referenced as a central goal of the Act. The preamble to the Act provides that it is designed "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] The forbearance authority provided to the Commission pursuant to Section 10 of the Telecommunications Act of 1996 is a vital component of the Commission's deregulatory

[5] Pub. L. No. 104-104, 110 Stat. 57 (Feb. 8, 1996).

toolkit and should remain a substantive option for targeted deregulation. Congress granted the Commission forbearance authority in the 1996 Act given the difficulty that the Commission had in detariffing interexchange services. The road to detariffing of interexchange services provides the classic example of the difficulties the Commission experienced in its attempt to deregulate. To rectify this, Congress granted the Commission forbearance authority in the 1996 Act. The D.C. Circuit terms Section 10 as "'[c]ritical to Congress's deregulation strategy.'"[6]

Congress not only granted the Commission this forbearance power but it required it to rule on a petition for forbearance within one year or it would be "deemed granted."[7] Clearly this "shot clock" with a presumption that called for the petition to be granted should the deadline be missed demonstrates not only the importance of this provision but the importance of forbearance as a regulatory tool (or more accurately, a deregulatory tool).[8]

In reviewing a petition for forbearance, the Commission is tasked with determining, in part, if the petition is in the public interest. Congress provided strong guidance here as well noting that the forbearance should promote competition.[9] The success of the Commission's long distance detariffing demonstrates how forbearance can effectively promote competition. The long distance market, already starting to experience the fruits of competition, really thrived after detariffing with myriad rate plans and lower rates.[10]

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[6] Cooper, *Delaying Deregulation: Forbearance at the FCC*, Perspectives from FSF Scholars, Vol. 4, No. 13 (2009), citing *AT&T v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006) (Tatel, J.).

[7] 47 U.S.C. § 160(c). The Commission could extend the one year period by ninety days. In the Senate version of the Act, the period for a determination was ninety days with a possible sixty-day extension. 142 Cong. Rec. H. 1078.

[8] Cooper at 3.

[9] 47 U.S.C. §§ 160(b), 160(a)(3).

[10] *See*, *e.g.*, News, "FCC Chairman Delivers Report Card on the New FCC to Congress; Kennard Outlines 'Faster, Flatter and More Functional' Agency for the Broadband Internet Age",

As already noted, deregulation is a key goal of the 1996 Act. As the Supreme Court opined in assessing the Commission's impairment standard, a proper impairment standard should be limited by the "goals of the Act".[11] Since the goals of the Act include creating a pro-competitive communications market in a deregulatory framework, all other things being equal, the Commission should strive for an approach that can be pro-competitive and deregulatory.[12]

As noted above, forbearance can be an effective tool in promoting competition. It also allows the Commission to apply deregulation in a targeted manner. For instance, in the *Omaha Forbearance Order*, the Commission examined the competitive landscape on a MSA level and applied forbearance to certain UNE requirements on a wire center basis.[13] Clearly if competition is thriving in certain geographical areas, the Commission should retain its ability to apply deregulation in that area in a manner appropriate to the level of actual and potential competition.

III. THE COMMISSION SHOULD RETURN TO THE FORBEARANCE STANDARD NO MORE STRINGENT THAN IT EMPLOYED IN ITS *OMAHA FORBEARANCE ORDER*

A. Overview

There are significant differences in the approaches the Commission has taken on the various forbearance petitions it has reviewed. There is the approach that the Commission

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Mar. 21, 2000 and attachment ("In the *long distance market*, competition has been growing steadily since divestiture of AT&T in 1984. The FCC's deregulatory efforts have contributed significantly to increased competition. Domestic long-distance rates dropped nearly 56% in real terms since 1984, saving consumers about $ 200 billion. Some companies are offering services for as low as five cents a minute.") (emphasis in original).

[11] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002), quoting *Iowa Utilities Board*, 525 U.S. 366, 388 (1999) (subsequent case history omitted).

[12] *See* 2008 FCC Trends in Telephone Service Rep., Table 9-4 (From 1999 to 2007, the number of carriers identifying themselves as interexchange carriers on FCC Form 499-A doubled from 178 to 351), Table 9-5 (From 2000 to 2007, the market share of smaller carriers, *i.e.*, other than the largest seven IXCs, rose from 20% to 36.8%).

[13] *See* note 4, *supra*.

followed in *Omaha* and *Anchorage*, where it took a more structural approach to forbearance, *i.e.*, inquiring whether the proper conditions are in place to ensure that competition will continue to develop in the markets being examined. The Commission reasoned that if these conditions are in place, the specific market metrics with respect to actual competition are less relevant as the Commission anticipates that robust competition will develop on a going-forward basis.

The more recent approach in the Verizon 6 MSA and Qwest 4 MSA proceedings focused on the "here and now" of competition -- placing primacy on actual competition metrics. If a particular competitive threshold was not met, forbearance was not appropriate even if all indications suggest that robust competition is developing and will continue to develop in the near future.

At the root of the differences in the approaches is a difference in evaluative focus. The Omaha approach is about anticipatory deregulation, *i.e.*, that deregulation is needed to propel further competition and if deregulation is provided, the competition will develop, *i.e.*, a "build it and they will come" approach. The Verizon 6 MSA/Qwest 4 MSA approach is all about attempting to measure market power and making conclusions about competition based on existing market shares. Ultimately the Commission needs to make a determination as to which approach is more in accord with the pro-competitive, deregulatory goals of the Act.

1. The Omaha Standard

The Commission utilized a three pronged approach to its analysis of the Omaha Petition. The approach evaluated both existing competition and the potential for future competition. The first step in the Omaha analysis was to examine the retail market. The Commission recognized that in evaluating the level of competition in a market, the Commission should not focus exclusively on competition provided using "identical technology that is currently deployed by the incumbent LECs."[14] Thus, intermodal competition was not only factored into the competitive analysis, but played a crucial part of the analysis.[15] And the Commission, particularly in the enterprise market, was not particularly concerned with the amount of existing competition, but the potential of Cox to mirror the same success it had in the mass market in the Omaha enterprise market.[16] The D.C. Circuit found this approach to be more-than-appropriate.[17]

The next step in the Omaha approach was to examine the role of the wholesale market. The Commission found that the lack of any significant alternative sources of supply for wholesale inputs for carriers in this geographic market was not dispositive. The Commission determined that Qwest's own wholesale offerings will continue to be sufficient without the forborne loop and transport UNEs. For mass market offerings, the Commission noted that

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[14] *Qwest Omaha Forbearance Order,* 20 FCC Rcd at 19447.

[15] *USTA v. FCC*, 290 F.3d at 429 ("As Justice Breyer's separate opinion carefully explained, mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource. *Iowa Utilities Board*, 525 U.S. at 428-29. And, as we said before, the Court's opinion in *Iowa Utilities Board*, though less explicit than Justice Breyer on the need for balance, plainly recognized that unbundling is not an unqualified good--thus its observation that the Commission must 'apply some limiting standard, rationally related to the goals of the Act,' *id.* at 388, and its point that the Commission 'cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network,' *id.* at 389. In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition. The Commission's naked disregard of the competitive context risks exactly that result.")

[16] *Qwest Omaha Forbearance Order,* 20 FCC Rcd at 19448 ("While Cox has captured a larger share of mass market customers to date, in light of record evidence of Cox's strong success in the mass market, its possession of the necessary facilities to provide enterprise services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Omaha MSA, and its current marketing efforts and emerging success in the enterprise market, we must conclude that Cox poses a substantial competitive threat to Qwest for higher revenue enterprise services as well.")

[17] *Qwest v. FCC*, 482 F.3d at 480 ("And we see nothing unreasonable in the factors invoked by the Commission -- enumerated above -- in forecasting an increase in competition.")(citations omitted).

Qwest's residential QLSP (then QPP) arrangements (*i.e.*, combinations of DS0 loops, switching, and shared transport) and residential resale arrangements in the 9 wire centers in which unbundling relief was provided was sufficient. Again the Court found the approach to be in conformance with the goals of the Act.[18]

The Commission also determined that there is a very high level of retail competition in Omaha -- competition that does not rely on Qwest's facilities. Qwest receives little or no revenue when such competition occurs, which provides Qwest with the incentive to make attractive wholesale offerings available so that it will generate revenue indirectly from retail customers who choose a retail provider other than Qwest.[19] Finally, the Commission looked at the extent of the coverage of the competitive facilities. The Commission held that:

> While our decision today relies on competitive factors other than facilities-based competition from Cox, to the extent our decision today is based on competition from Cox, we find such competition to be sufficient to justify forbearance in wire center service areas where Cox is willing and able within a commercially reasonable time of providing service to **[REDACTED]** percent of the end user locations accessible from that wire center. We believe that requiring that Cox cover at least **[REDACTED]** percent of the end user locations in a wire center service area before Qwest obtains forbearance from section 251(c)(3) unbundling obligations in that wire center will ensure that all of the customers capable of being served by Qwest from that wire center will benefit from competitive rates,

[18] *Qwest v. FCC*, 482 F.3d at 480 ("As the TRRO explicitly left open the possibility that 'sufficient facilities-based competition' might eventually make UNE relief appropriate in the local exchange market, either generally or in geographically specific markets, . . . the Order seems simply to apply that concept: here the Commission found the combination of tariffed ILEC facilities and facilities-based competition adequate to assure competition even if it partially relaxed Qwest's obligations in the Omaha market.") (citations omitted).

[19] *Omaha Forbearance Order*, 20 FCC Rcd at 19449 ("This gives us enormous comfort that in the mass market, unbundling loops and transport pursuant to section 251(c)(3) is 'not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.'") (Citing 47 U.S.C. § 160(a)(1)).

terms and conditions.[20]

Again by focusing on the area coverage as opposed to actual subscription levels, the emphasis is placed on potential competition as opposed to actual competition.[21] Qwest views this emphasis as appropriate and most consistent with that articulated in the law and economics literature.

2. The Verizon 6 MSA/Qwest 4 MSA Approach

In the *Verizon 6 MSA Order* and *Qwest 4 MSA Order*, in what the D.C. Circuit viewed as an "unexplained departure from its precedent," the FCC eschewed the "potential competition" approach in favor of an "actual competition" approach.[22]

To determine "evidence of facilities-based competition," the Commission applied a market share test and diluted the consideration of competitive facilities coverage.[23] The D.C. Circuit found fault with the Commission's failure to posit a credible rationale for the change.

The Commission, however, had earlier explicitly disavowed a market share/market power analysis, stating that in its forbearance analysis it would consider various markets in a broader evaluation of competition instead of as steps in a traditional market power review.[24] In fact, the Commission went as far as to say, that a traditional market power analysis was inapt to assess

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[20] *Id.* at 19450-51 (footnote omitted). The Commission did subsequently publicly disclose that the coverage percentage threshold was 75%. *See*, Public Notice, WC Docket No. 04-223, 22 FCC Rcd 13561 (2007); *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11754 n. 127.

[21] The Court found that even the potential for wide variation in coverage at the wire center level did not undermine the Commission's conclusions. *Qwest v. FCC*, 482 F.3d at 479-80 ("But in light of the Commission's reliance on data showing Cox's aggressive expansion in both the residential and enterprise markets, we cannot say that the possibility of wide variance in existing coverage is enough to undermine the Commission's conclusions.")

[22] *Verizon v. FCC*, 470 F.3d at 296.

[23] *Id.* at 300.

[24] *Id.* at 303, *citing ACS UNE Forbearance Order*, 22 FCC Rcd at 1966, n.41.

competition in emerging and developing technology markets.[25] The D.C. Circuit determined that in the *Verizon 6 MSA* and *Qwest 4 MSA Orders*, the Commission did not provide a satisfactory explanation for its departure from this standard, and directed the Commission to consider whether the competition might be established by some evidence other than a simple market share benchmark, and to justify its departure from its precedent. The Commission is also tasked with considering whether and how the existence of potential competition would affect its Section 10 forbearance analysis.[26]

B. The Commission's Omaha Approach, While Still Unduly Stringent, Is More In Accord With The Goals Of The 1996 Act

The approach the Commission took in *Omaha* in evaluating Qwest's petition is the approach that best reflects the goal of promoting competition that underscores both Section 10 and the Act itself.[27] Both Section 10 and the Act are designed to promote competition and reduce regulation for the benefit of consumers. Promoting competition can be viewed either as a static concept or a dynamic one. A static concept of competition would be reflected in a market share approach, *i.e.,* a certain market share threshold needs to be reached by competitors to consider a market competitive. A dynamic approach, however, suggests that fluctuations in market share are not part of the relevant consideration. Instead, to promote competition, the Commission would need to craft its standard such that the potential for competition would be considered. This distinction is important as the Commission must determine whether its role is one of mandating the competitive outcome or fostering the competitive process. It is the latter objective around which the Commission should craft its policy design. The Commission is not able to

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[25] *Id.* at 303.

[26] *Id.* at 305.

[27] *E.g.*, 47 U.S.C. §§ 160, 161, 271; *see also* 47 U.S.C. § 204 nt.

guarantee, nor should it, that particular competitors will succeed; instead its task is to provide the regulatory structure such that the potential for competition is maximized over the long run. In this way, the success of the Act is not dependent on the success or failures of any particular competitor or business model, but on whether the proper environment has been created that fosters competition on the merits.

IV. THE COMMISSION'S CONTEMPLATED MARKET SHARE APPROACH IS NOT AN APPROPRIATE FORBEARANCE STANDARD AND DOES NOT ALIGN WITH THE GOALS OF THE ACT

A. Market Share And Market Power Does Not Provide An Accurate View Of The State Of Competition In The Local Telecommunications Market

As noted above, the Commission recognized that traditional market power analysis was inapt to assess competition in emerging and developing technology markets. The Commission was correct in this assessment and should therefore forego utilization of a market share/market power analysis in crafting a forbearance standard. Such an analysis is misleading in a regulated setting and hence biases any inferences that are drawn from it.

A market power analysis is misleading in a regulated environment because the market share of the incumbent provider is shaped more by regulatory fiat than the operation of the market. In fact, in their seminal piece on market power, William Landes and Richard Posner observe that the incumbent's high market share may reflect the absence rather than presence of market power.[28] For example, if a regulatory body maintains a rate at an artificially low level,

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[28] William W. Landes and Richard A. Posner, "Market Power in Antitrust Cases," *Harvard Law Review*, Volume 94, Number 5, March 1981, p. 976. Per the authors:

> For example, in many regulated industries firms are compelled to charge uniform prices in different product or geographical markets despite the different costs of serving the markets. As a result, price may be above marginal cost in some markets and below marginal cost in others. In the latter group of markets, the regulated firm is apt to have 100% market share. The reason is not that it has market power but that the market is so unattractive to other sellers that the only

for universal service or other public interest reasons, this may discourage competitive entry. In such a case, a high market share may not be a reflection of market power, but may simply indicate that regulators have set the rates below the appropriate market level.

A market share analysis is not forward-looking which renders any such approach in a technologically dynamic industry like telecommunications particularly inappropriate. It is an attempt to capture a snapshot of existing competition based on a metric that looks backward as opposed to forward, *i.e.,* it focuses on what has transpired in the market as opposed to where the market is headed.[29] Both the Justice Department and FTC have noted that market share measures may be misleading in terms of competitive significance when market conditions are changing.[30] The telecommunications market is by any measure such a dynamic market.

Market share measures are of limited value because they do not provide an indicator of the competitive alternatives *available* to customers. Market share measures are particularly problematic when one provider, such as Qwest, starts out with 100% of the market, but is now

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> firm that will serve it is one that is either forbidden by regulatory fiat to leave the market or that is induced to remain in it by the opportunity to recoup its losses in other markets, where the policy of uniform pricing yields revenues in excess of costs. In these circumstances, a 100% market share is a symptom of a lack, rather than the possession, of market power.

Id. See also, Dennis L. Weisman, *PRINCIPLES OF REGULATION AND COMPETITION POLICY FOR THE TELECOMMUNICATIONS INDUSTRY - A GUIDE FOR POLICYMAKERS*, The Center for Applied Economics, KU School of Business, Technical Report 06-0525, 2006, Section 3.5.2. (Chronicles the limitations of drawing inferences about market power from market share).

[29] For example, a regulated monopolist that begins with a 100% market share and experiences rivalry that reduces its share relatively quickly to 80% is likely in a far different competitive situation than a firm with a 50% market share merging with a firm with a 30% market share, despite the fact that in both cases a single firm has 80% of the market.

[30] *See* Section 1.521, U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, April 2, 1992 [Inclusive of April 8, 1997 Revisions] (This section indicates that market share measures can be misleading in terms of competitive significance when market conditions are changing.)

subject to competition from many directions, and is experiencing rapidly declining market share. Thus, if a market share approach is utilized in the context of the telecommunications industry it should be rooted in capacity not actual sales. Again, as the Commission itself noted in the context of the wireless industry, a high subscriber-based HHI and a high change in HHI may on a surface level give the appearance of a competitive problem.[31] There is, however, little likelihood of harm when other carriers are present with the capacity to serve customers. In such a situation, market shares would underestimate the likely future competitive impact of these carriers. Such was the case in the nascent wireless industry where duopoly-like conditions were eventually undone by the competitive presence and capacity of other wireless carriers which drove down the market shares of the more "dominant" providers.

In this context, imposing, or maintaining, stringent regulatory controls on the incumbent in the name of protection and/or promoting competition will impose more costs than benefits. At least this was the apparent lesson learned from the interexchange market and the handcuffing of the incumbent's ability to competitively respond. Three of the regulators who applied restrictions on competitive pricing responses by AT&T at the time eventually came to regret such actions.[32] The attempt to protect the IXC competitors was actually harming consumers

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[31] The Hirschman-Herfindahl Index ("HHI") is computed as the sum of the squared market shares of each firm in the market. Section 1.5, Horizontal Merger Guidelines. The HHI ranges from effectively 0 in the case of atomistic competition to 10,000 in the case of a monopoly.

[32] Mark S. Fowler, Albert Halprin, and James D. Schlichting. "'Back To The Future': A Model For Telecommunications." *Federal Communications Law Journal*, Volume 38, Number 2, 1986, pp. 193-194. [At the time this article was written, the authors were, respectively Chairman, Chief, Common Carrier Bureau, and Special Counsel, Common Carrier Bureau, Federal Communications Commission.] The authors noted:

> It can be argued, for instance, that some of the Commission's regulatory actions in the interexchange market that were designed to promote competition during transition, such as . . . restrictions on competitive pricing responses by AT&T, . . . will have resulted in substantial, unnecessary costs for society that never would have been incurred in a truly competitive marketplace. Moreover, this approach

because of the higher prices AT&T was required to charge. These actions were not sowing the seeds for a competitive market; instead they were more of a pesticide harming not only the incumbent provider but consumers as well.

B. Any Perceived Lack Of Competition In The Local Telecommunications Market Is Due To Regulatory Rate Distortions

Historical measures such as market share and the HHI are not useful in determining whether an ILEC has met the forbearance standard outlined in Section 10 of the Act. As a result, these measures should not be employed by the Commission in its forbearance analysis. Instead, the Commission should focus on conditions that are present in the market today, as well as those that are likely to be present going forward. Such an analysis would take into consideration competitive alternatives that are available (*i.e.*, competitive capacity) as well as those that are likely to emerge in response to market incentives. This more closely aligns with the standard that the Commission followed in the Omaha forbearance proceeding. As noted earlier, historical market share and HHI measures are impacted by past regulatory decisions and inefficient rate design policies, and do not reflect competitive alternatives that are now available, or will be available in the future, and most certainly do not accurately reflect an incumbent's market power on a going forward basis.

A forward-looking competition standard must be designed to achieve both the reduced regulation and the incentives to invest in new technologies that the Congress envisioned for the local telecommunications market. A pro-competitive, deregulatory standard such as the one Qwest posits -- which the Commission initially utilized in the forbearance context -- will enable Qwest to offer market-based pricing in the 4 MSAs. This will lead to real competition in the

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will have directly increased consumer costs by requiring regulated firms to charge higher prices to protect competitors during the transition.

MSAs devoid of pricing distortions arising from regulatory mandates.

Currently market shares in the market for local telephone service are distorted and artificially inflated in large part due to inefficient rate-design policies of the past. Rates set at artificially low levels would tend to discourage competition, and would result in less substitutability between competing technological platforms than would otherwise be present. This reflects a phenomenon known as the *Cellophane Fallacy*.[33] This fallacy occurs when two or more products may appear to be substitutable, or not substitutable, but such is an artifact of extant prices diverging from competitive levels.[34] For example, if wireline rates are set at artificially low levels as a result of deregulation, this may result in less substitution of wireless service for wireline service than would otherwise occur had wireline prices been set at the efficient market rate. As a result of this bias, policy-makers might erroneously draw the market boundaries around wireline services too narrowly (*e.g.*, by improperly concluding that wireline and wireless services are not in the same market, and that wireless is not a substitute for wireline services).

This phenomenon highlights the disconnect between perceived market power and actual market power. Market power is the ability of a firm to profitably maintain prices above competitive levels for a significant period of time.[35] Since wireline prices have been kept below competitive levels for years to fuel regulatory mandates, ILECs can raise prices without necessarily experiencing the same customer loss that would be observed if prices were raised

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[33] *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393-404 (1956).

[34] For example, the higher penetration of wireless service in Japan and Europe is explained in part by the lack of subsidies and the higher price for wireline telephony. *See* Jerry Hausman, "Mobile Telephone" in Martin Cave, Sumit Majumdar, and Ingo Vogelsang, eds. *Handbook of Telecommunications Economics*. North-Holland: Amsterdam, 2002, Chapter 13 at 564-65.

[35] Note 30, *supra,* Section 0.1, Horizontal Merger Guidelines.

above market levels. Thus, the ability to raise artificially low prices to the appropriate market level is not an indicator of market power.

C. The Problems With Applying Narrow Market Definition Guidelines In A Competitive Environment

Market definitions have typically been designed to facilitate the computation of market shares. As discussed above, defining the market is problematic under conditions in which rates have been set by regulatory fiat. It follows that any computation of market shares based on a suspect market definition exercise will give rise to biased measures of market share and therefore are of limited or no value.

Unless these distinguishing factors are taken into account, there is a legitimate concern that the market will be defined too narrowly due to a perceived lack of demand substitution. But the ability of an ILEC to sustain a price increase remains tied to the fact that its prices are below competitive levels due to regulatory fiat. For an ILEC to be deemed to have market power, it is not enough that it is able to raise prices, but it must be able to sustain a price increase above competitive levels. Even if an ILEC has been granted the ability to raise its local prices by a state commission, it is highly likely that the prices are still below competitive levels. Thus, any consideration of market power is premature until the ILEC is actually able to reach a point in which it actually would be able to raise prices above a competitive level. Hence, it is not possible to draw any meaningful inference about ILEC market power solely on the basis that it may have raised its prices or attempted to do so.

D. The ILEC's Prices Are Constrained Through Competition Occurring At The Margin

The Commission's return to a market share analysis in the *Verizon 6 MSA* and *Qwest 4 MSA Orders* was understandably fueled by a concern that there must be some way to discern that ILEC pricing is constrained before granting forbearance. However, market share does not provide an accurate indicator of whether prices are constrained because ILEC pricing is constrained through competition that occurs at the margin.[36] That is, as long as there is a subset of customers that would move to a competitive substitute if a price were to increase, this provides pricing discipline.

For example, in order for wireless to serve as a price-constraining substitute for wireline services, *all customers need not view it as a substitute.* As long as there are a sufficient number of customers willing to "cut the cord" (often called customers "at the margin"), this serves to constrain Qwest's prices. While wireless does not represent a substitute for *all* wireline customers, it is a substitute for many customers -- a fact proven by the large number of households that have already "cut the cord" and have become wireless-only. Finally, in order for wireless to serve as a price-constraining substitute for wireline services, *it need not be identical to wireline service*. While there will *always* be some differences between wireline and wireless service in terms of quality of transmission, data capability, mobility, ergonomics, etc., this does not mean that they are not substitutes for voice services. The bottom line is that wireless does not have to be identical to wireline service, nor does it have to be a substitute for all customers, in order for it to constrain Qwest's pricing of local exchange service. The Commission should resist fallacious claims from other parties that wireless (as well as VoIP-based services) are in a separate market and therefore exert no *price-constraining* discipline on wireline services.

It is important to recognize that for an ILEC the vast majority of costs associated with serving customers are not avoided when a customer discontinues service. Hence, when a customer leaves Qwest for the services of other providers, the revenues that are lost are not offset

[36] The phrase that "competition occurs at the margin" means that it is the marginal customers, those willing to substitute alternative services in the face of a price increase, that serve to impose pricing discipline on the market provider.

by a corresponding reduction in costs. A large portion of an ILEC's costs are sunk costs in the sense that the costs of facilities and systems already deployed remain regardless of particular customer migration. The implication is that even relatively modest levels of competition will likely be sufficient to impose the requisite pricing discipline.[37] The pricing discipline is compounded by the presence of demand complementarities -- the loss of an access line and its associated revenue does not occur in isolation, but frequently carries with it the loss of long-distance and vertical service revenues as well.

E. The Commission Must Maintain Its Focus On Promoting Competition As Opposed To Constraining The ILEC

As noted previously, the provisions of the 1996 Act must be considered in context with the pro-competitive, deregulatory goals of the Act. In its impairment decisions in the *Triennial Review Order* ("*TRO*") and *Triennial Review Remand Order* ("*TRRO*"),[38] the Commission recognized and applied the Act's pro-competition deregulatory goals in the context of making its impairment determinations. Thus, it did not rely on traditional measures of market share and market power, but rather the Commission made its determinations based on whether competitors were able to compete on a going-forward basis. There is no reason to retreat from this approach in a forbearance petition pursuant to Section 10 and move back to a traditional historical market share approach.

The Commission, in its *Triennial Review Order*, noted:

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[37] Thus, competition from imperfect substitutes will likely be sufficient to discourage wireline price increases.

[38] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020 (2003), *on remand*, 20 FCC Rcd 2533 (2005).

> The purposes of a market power analysis are not the purposes of section 251(d)(2). While this antitrust analysis attempts to determine whether market participants would be able to exercise market power and raise prices above competitive levels if a merger were consummated, the Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power. A market power analysis would go to the question of whether an incumbent LEC could raise its retail prices unchecked; the impair analysis asks whether a new entrant can provide its services without the UNE. A market power analysis might be appropriate if the only goal of the Act were to drive prices to cost, but that approach disregards the Act's other goals of encouraging the deployment of alternative facilities and new technologies and reducing regulation. (Footnotes omitted.)

Tellingly, the Commission recognizes how inapt a market power approach is for purposes of the Act. The Commission also highlights the pro-competitive, deregulatory goals of the Act. For the same reasons, the Commission needs a standard that will further these goals. Like the decision on whether to provide unbundling relief, the forbearance determination does not turn on market share or market power, but on determining whether an efficient firm has an opportunity to compete with the ILEC in the relevant market. This determination should not be guided by the level of existing competition, but should be based on whether competitive alternatives exist today and whether the potential for future competition is present. The goal is not to advantage particular competitors in the local service market but simply to foster an environment in which competition can flourish for the benefit of consumers.

The Commission has previously recognized that network "unbundling is one of the most intrusive forms of economic regulation -- and one of the most difficult to administer . . ."[39] Moreover, any static efficiency gains (measured in terms of reducing price-cost margins) must be weighed against dynamic efficiencies foregone (measured in terms of reduced incentives for

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[39] *TRO*, 18 FCC Rcd at 17051 ¶ 109. Forbearance is a critical component of the FCC's unbundling framework because, as the Commission itself recognized, the UNE rules admittedly are too blunt an instrument to address market by market variations. *See TRRO*, 20 FCC Rcd at 2556-57 ¶ 39.

investment in innovation). Indeed, recent studies have shown that leased access has not led to a level of CLEC investment in facilities greater than that which would have obtained otherwise. To the contrary, access dependence turns out to be economically addictive, leading to increased reliance on leased access.[40]

The Commission has rightfully been concerned about last mile access facilities. However, competitors that purchase UNEs have the ability to purchase services from intramodal and intermodal non-ILEC competitors, such as cable companies, other CLECs and fixed wireless providers. These competitors can also self-provision facilities. Thus, competitors have options with which to break their dependence on UNEs in highly competitive MSAs, but they have often not pursued them. The regulation of an ILEC should not turn on the imprudent choices of its competitors. Nor should an ILEC be regulated simply because a competitor refuses to invest in its own facilities or to avail itself of other wholesale alternatives.

[40] For a recent review of this literature and the policy lessons to be drawn from it, *see* Glen O. Robinson and Dennis L. Weisman, "Designing Competition Policy for Telecommunications," *The Review of Network Economics*, Vol. 7, Issue 4, December 2008 at 509-46.

V. CONCLUSION

The Commission should return to the approach it utilized in its *Omaha Forbearance Order* in order to craft a forbearance standard that aligns with the goals of the Act.

Respectfully submitted,

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September 21, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket Nos. 06-172 and 07-97; 2) served via email on the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission at CPDcopies@fcc.gov; and 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

September 21, 2009